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IS THE DOCTRINE OF CONSIDERATION SENSELESS AND ILLOGICAL?

IN a recent article Dean ASHLEY, a distinguished authority on contracts, takes the somewhat paradoxical position of being at the same time counsel for the defense and also prosecutor of the doctrine of consideration. While defending it against various relaxations and modifications which have been suggested to accomplish more rational and just results, which he denounces as subterfuge and unwarranted usurpation of legislative power by the courts, he also, as it were, saws off the branch he is sitting on, by contending that the time has now come, either for the courts themselves to overrule the entire doctrine, or for the legislature to act and by a brief statute declare that the doctrine of consideration is hereby abolished.[1]

Is the doctrine of consideration "a technicality existing simply because of the historical development" of contract; a legal rule "which is unnecessary, and which frequently works rank injustice;" is it one of the "outgrown doctrines" which lead the people to regard law and lawyers with suspicion and which neither courts nor writers understand or are willing to apply consistently?

If this accusation is true, it is indeed a severe indictment, and it is worth while to inquire whether there is not any intelligible reason, purpose or policy underlying the requirement of consideration by our courts, by which it has been enabled to survive for over three centuries as a basic doctrine of the most important branch of our law; and whether if there are serious defects in the test of consideration, they can not better be corrected by relaxations and modifications, than by an entire abolition of this fundamental requirement.

If we look for a moment at the history of the law we shall find

[1] Clarence D. Ashley, Doctrine of Consideration, 26 Harv. L. Rev. 429, March, 1913.

that consideration came to be recognized as one of the elements of simple contract by a more or less accidental and obscure historical evolution.[1a] It was evolved in the judicial process of furnishing a remedy to those cases which could be brought within the theory of the action of special *assumpsit*. This form of action was a branch of trespass on the case, which called for a remedy where there was a wrong or injury inflicted, on the principle *ubi jus, ibi remedium*. *Assumpsit* was not originally founded on the idea of enforcing a promise like *covenant*, but of redressing a wrong. No wrong is ordinarily done by the breach of a merely gratuitous promise, or *nudum pactum*.

The consideration then is the ground of enforcement; that which renders a promise not merely gratuitous, but one resting on a just and obligatory basis with a sufficient reason for enforcement. The doctrine of consideration is a not very successful attempt to generalize and reduce to a rule of thumb that reciprocity which must exist in an agreement to make non-performance a legal wrong on the part of the promisor. It is not a mere arbitrary, unreasoning technicality, a mere requirement of obsolete procedure.

The common law, in requiring a consideration, treats all simple contracts as resting primarily on the basis of bargain, as contrasted with those promises which are simply gratuitous and in which there is no mutuality of concession or benefit flowing to each party. The typical contract in the common law may be defined as an obligation arising from a bargain. All business dealings consist, in the last analysis, of bargains or arrangements for present and future exchange. Without some positive sanction for the expectation that bargains will be honestly fulfilled, men would be unable to do business or make reliable arrangements for the future.[2]

Dean ASHLEY asserts that this is not the reason of the rule, and seems to believe that consideration exists for its own sake. But nothing operates as a consideration which is not regarded or treated as an item of exchange by the parties. It must be offered by one party and accepted by the other as the "conventional inducement" or reciprocal concession for what is promised.[3] The phrases, "at defendant's request," "in exchange for the promise," "in consideration of," unmistakably point to the fact that the rules of consideration find their object, their reason for existence in the law, primarily

[1a] See e. g. Debt, Assumpsit and Consideration, W. S. Holdsworth, XI Mich Law Rev. 347.

[2] Wald's Pollock on Contracts, 3rd ed. 1, 2.

[3] Fire Insurance Association v. Wickham, 141 U. S. 564, 579; see also Holmes Com. Law, 292; Williston on Sales, 958; Wald's Pollock on Contracts (3rd ed.) 323, n. 8.

as a test whether the engagement of the parties is put on the basis of bargain, or whether it is gratuitous, and so lacking any ground of enforcement. Incidentally, the "legal detriment" part of the definition of consideration is a secondary test as to whether the thing given or to be given in exchange has any possibility of value in the eye of the law sufficient to afford any real reciprocity. The reciprocal nature or business basis of the transaction is that of which the apparently arbitrary and technical rules of consideration furnish the touchstone or test, and is that which makes the application of the doctrine of consideration not so irrational and lacking in any intelligible purpose as Dean ASHLEY would have us think.

It may be admitted that the strict and orthodox doctrine, which takes bargain as the universal and only sufficient legal reason for enforcing a promise, is not an entirely valid generalization of all the grounds that should be recognized for the enforcement of simple promises. Bargain is not the only reason which makes the enforcements of promises justly imperative, but as Professor Samuel WILLISTON has suggested to the writer, "why should not a promise be enforced, if the promisor might reasonably suppose the promisee would act in reliance on the promise, and if the promisee has in fact done so?"[4] In other words, he favors the extension of the doctrine of consideration by a theory of *quasi-estoppel* adopted in some states, and especially in the subscription paper cases.[5] In these cases a promise originally gratuitous, which has been relied and acted upon by the plaintiff, is upheld, as a wrong would be done if the promise were not enforced.[6]

Professor WILLISTON objects to the doctrine of "moral consideration," advanced by Lord Mansfield, the other great relaxation of the bargain test, chiefly because of the great vagueness of moral consideration. But if the doctrine of moral obligation, as a basis or ground for the enforcement of a promise, be extended only to cases of moral obligation arising from unjust enrichment by the receipt of material or financial benefit, as where one promises to repay another who has paid his indebtedness without authority, or for improvements placed on his property by mistake, such "moral obligation" would seem to be sufficiently tangible and definite to be a just and desirable relaxation of the strict requirement of considera-

[4] In Private correspondence.

[5] Beatty v. Western ollege, 177 Ill. 280; Simpson College v. Tuttle, 71 Iowa 596; Devecmon v. Shaw, 69 Md. 199; Steele v. Steele, 75 Md. 477; Ricketts v. Scothorn, 57 Neb. 51.

[6] See also Wald's Pollock on Contracts (3rd ed.) 215, n. 24; Harriman on Contracts (2nd ed.) § 129, 150, 649.

tion, and it is certainly coming to be recognized by a very respectable number of American authorities.[7]

The truth is, the doctrine of consideration is not irrational, but the old definitions and tests are not wide enough to cover all cases of just obligation arising from a promise, and have to be strained to cover such cases as a change of position in reliance on a promise to make a gift; and fail to reach moral obligations of justice and common honesty founded on value received, almost sufficient to raise a *quasi-contract,* which, when recognized by a promise, ought to become binding in law. It is submitted that there should be recognized at the present day, three distinct forms of consideration, or grounds why it is unjust to break a promise and why a promise should be binding: (1) the usual one, the reciprocity of bargain or exchange; (2) cases of *quasi-estoppel* or justifiable reliance on a gratuitous promise; and (3) an existing obligation, legal, equitable, and also moral if based on value received, and coextensive with the promise.

The conception of consideration as a test of the intrinsic nature of the transaction, as based on an exchange present or future, rationalizes and illuminates the whole doctrine and furnishes the key to the maze of conflicting views as to the element of consideration in bilateral contracts, and gives it a logical, rational and scientific basis.

"What logical justification is there," asked Sir Frederick POLLOCK, "for holding mutual promises good consideration for each other? None it is submitted."[8]

That is true if we assume the premise that the consideration in a bilateral contract must be found in a present detriment imposed by promise at the instant the contract is made; for neither promise before it is known to be binding is in itself any detriment to the promisor.

From the year 1588 courts have designated the promise as consideration for the counter-promise in bilateral contracts.[9] Lawyers and learned writers have religiously repeated the formula: "It is the counter-promise and not the performance that makes the consideration."[10] But no one has satisfactorily analyzed this ancient

[7] See exhaustive note to Muir v. Kane (1910) 26 L. R. A. (N. S.) 552; see also the writer in 7 Borchardt's Commercial Laws of the World, 84, 87.

[8] 28 Law Quar. Rev. 101, Jan. 1912; Pollock on Contracts (8th Eng. Ed.) 191; compare note by Williston to 3rd Am. Ed. 201, N. 4.

[9] Strangeborough v. Warner (1588) 4 Leon. 3; Wichals v. Johns (1599) Cro. Eliz. 703; Bettisworth v. Campion (1608) Yelv. 134.

[10] Hobart in Lampleigh v. Braithwaite (1616) 1 Sm. L. C. 155; Langdell, Summary § 81; Wald's Pollock on Contracts, 3rd ed. 186; Harriman on Contracts, 2nd ed., § 194; Vickrey v. Maier (Cal. 1913) 129 Pac. 274.

formula to show how it is that reciprocal promises can support each other, like two men mutually holding each other above the ground. Attempts at analysis have most frequently been made in connection with the question whether a promise to do a thing will or may be a consideration, where the actual doing of it would not be; *e. g.*, where one promises to do a thing which he has already contracted with a third person to do. The solution of this question tests to the uttermost one's theory of consideration, and "if it cannot be applied here it is not good for much anyhow."

LANGDELL, POLLOCK and BEALE contend that the second promise, being the incurring of a new detriment or burden, is sufficient consideration, though each promise be to do the same thing and though the doing of the thing would not be consideration.[11]

Professor WILLISTON thinks that from a rational standpoint it is an odd distinction to hold that an assurance of future performance is a better consideration than actual present performance, or that a bird in the hand is worth less than a bird in the bush.[12]

To solve this puzzle whether a promise to do something one is already under contract to do may be consideration, one must ascertain just what is the element or nature of consideration in the case of bilateral contracts. It is contended by Professor AMES that the consideration is found in the act of promising, that the mere making of a promise, on request, *animo contrahendi,* is sufficient consideration; and that any promise whatever, not in violation of public policy, is sufficient consideration to support a counter-promise.[13] So POLLOCK lays it down that it is the promise, and not the obligation thereby created, that is the consideration, although he admits that the value of the promise does not consist in the act of promising but in the obligation.[14] But it seems fanciful to suggest that mere words, movements of the lips, vibrations of the vocal cords, the act of signing one's name, are the consideration requested.[15]

Professor LANGDELL explains the element of consideration on the ground that the courts early perceived that "the making a binding promise was the giving or doing something of value, and hence such promises were entitled to be admitted into the category of

[11] Langdell, Summary, § 84; 14 Harv. L. Rev. 496; Wald's Pollock on Contracts, 3rd ed. 209, n. 19; Beale, 17 Harv. L. Rev. 71, 81, 82.

[12] Note to Wald's Pollock on Contracts (3rd ed.) 210; see also Harriman on Contracts, 2nd ed., § 123; Ashley on Contracts, 103; Ames, 13 Harv. L. Rev. 30; 2 Street, Foundations of Legal Liability, 118, 119.

[13] Ames, 13 Harv. L. Rev. 29, 32.

[14] Wald's Pollock on Contracts, 202.

[15] See Beale, 17 Harv. L. Rev. 77.

sufficient considerations."[16] He proceeds to say: "So the rule that both the mutual promises must be binding, or neither will be, is only an application of the rule that a consideration must have some value in the eye of the law; for if one of the promises for any reason is invalid, of course the other has no consideration, and so they both fall."[17]

Professor ASHLEY, who is a disciple of LANGDELL, contends that "promise" in the consideration formula must be understood to indicate an obligation.[18] It would also seem to be the view of the courts that in bilateral contracts it is the counter legal obligation which furnishes the consideration. Thus HOLT, C. J. says: "Either all is *nudum pactum* or else the one promise is as good as the other."[19]

There are at least three serious objections against the soundness of this generally accepted theory that obligation is consideration for obligation: (1) In many cases where there is no real obligation and no "legal detriment" resulting from the promise on the one side, there is still held to be no lack of consideration to support the counter-promise on the other; (2) In certain cases, where the promise, if binding, would impose a "legal detriment" there is held by the authorities to be no consideration; (3) As an attempted application of the detriment test of consideration, it involves the fallacy of question-begging or arguing in a circle, for legal obligation cannot be the source of consideration, and consideration at the same time the source of legal obligation.

If it is the binding promise or legal obligation of each party which forms the consideration for the promise of the other, how are you to explain the variety of cases in which one party is liable on the contract but not the other?

As a general rule, it is true that bilateral contracts do not bind either party unless both are bound, as in the case of a contract with a married woman. This is so, however, not necessarily for the rea-

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[16] Langdell, Summary, § 81.

[17] Langdell, Summary, § 82.

[18] 16 Harv. L. Rev. 319; Ashley on Contracts 90, 92.

[19] Harrison v. Cage (1698) 5 Mod. 411.

Thus Sanborn, J., says in a leading case, "A promise is a good consideration for a promise. But no promise constitutes a consideration which is not obligatory upon the party promising. It must bind the promisor so that the promise may maintain an action for its breach, or it is without legal effect and void." Coldblast Transportation Co. v. Kan. Cty Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696.

So the Supreme Court of Georgia lays it down: "A promise, however, is not good consideration for a promise unless there is an absolute mutuality of engagement, * * * and in case of mutual promises, where the promise of one party is relied on as consideration for the other, the promises must be concurrent and obligatory upon each at the same time in order to render either binding." Morrow v. Southern Express Co., 101 Ga. 910, 28 S. E. 998; see also Vogel v. Pekoc, 157 Ill. 339.

son that the promise of the married woman, being void in law, cannot serve as a consideration, or that there is no consideration present in the bargain, as has been somewhat hastily assumed. Invalidity of a contract for lack of mutuality of obligation does travel on the principle of lack of consideration, where *by the terms of the bargain* the plaintiff does not assume any definite undertaking, or where the promisee, by his mere acceptance, has really promised nothing in return.[20] But where one promise is unenforceable, and the lack of mutuality of obligation is due to some fact *outside* the content of the bargain, such as incapacity of one of the parties, the Statute of Frauds, fraud, duress, or the like, there seems to be no trouble about lack of consideration, though there is no mutuality of obligation.[21]

In any system of law, whether the peculiar doctrine of consideration is recognized or not, if the law refuses to impose an obligation on one party to a two-sided bargain, as in the case of a married woman at common law, this might in and of itself furnish a reason why neither party should be bound, and why the bargain should fail altogether. Invalidity for lack of mutuality of obligation is not in all cases, therefore, to be attributed to lack of consideration.[22]

In *Justice* v. *Lang*,[23] the distinction between lack of consideration and want of mutuality of obligation is brought out, and it is held that although the plaintiff may not be liable to an action on the contract because of the Statute of Frauds, that does not destroy the consideration or let off the party who has signed a memorandum of the contract. In other words, there need not be mutuality of obligation in all cases to make a contract binding. Professor AMES enumerates various instances of this, such as contracts procured by fraud, for example, an engagement to marry between a man already married and a woman who believed him to be single.[24] Similarly, an infant plaintiff may sue on a contract, though his infancy would be a defense to an action against him.[25] So by the weight of American authority, "a contract made by one who is drunk or of unsound mind, so as to be incapable of understanding the nature of his act, is generally held not void, but voidable at his option."[26] There would seem to be no such mutuality of obligation

[20] See Burgess Fibre Co. v. Broomfield, 180 Mass. 283, 62 N. E. 367.

[21] Cf. I Page on Contracts 451, 460.

[22] But compare Harriman on Contracts, 2nd ed., § 103.

[23] 42 N. Y. 493, 521; contra Wilkinson v. Heavenrich, 58 Mich. 577; 1 Am. Rep. 57.

[24] Ames, 13 Harv. L. Rev. 33, 34.

[25] Holt v. Ward, 2 Str. 937; Willard v. Stone, 7 Cowen (N. Y.) 22, 17 Am. Dec. 497.

[26] Wald's Pollock on Contracts, 3rd ed., 100 n. 52.

in all these cases as is said to be so necessary to the existence of consideration. It may be argued that the obligation imposed need not be perfect, and that a contract voidable under the Statute of Frauds, or for infancy, insanity or fraud, is not entirely without value, and may be ratified without new consideration.[27] But as has been said, "What sort of obligation is that which binds the obligor at his option only?"[28]

It is generally held that if one party has the priivlege at his election of withdrawing from the alleged contract, or of doing nothing at all thereunder, such a contract is void for want of mutuality.[29] It is accordingly very hard to reconcile the preceding cases with the accepted test of consideration or to fit them into the theory that obligation is consideration for obligation. There may be sufficient consideration, though there is no real mutuality of obligation, and no binding promise on one side to support the counter-promise on the other.

We come now to the second objection to this theory. If a "binding promise" is a consideration because it is a detriment, then promising to do something which one is already under obligation to perform would be sufficient consideration for a new promise, because it would be a legal detriment if binding; clearly so if made to a third party as creating a new liability to him; and even if made directly to the obligee, by starting the statute of limitations to run afresh, it would be a legal detriment to one party and a benefit to the other. Accordingly, an application of this "obligation theory" in the test cases does not square with the authorities.[30]

The third argument against this theory is that legal obligation cannot be the source of consideration and at the same time consideration be the source of legal obligation. This is a case of lifting yourself by the boot-straps. It is a complete circle to say that promises are binding because they are consideration for each other, and that they are consideration for each other because they are binding and so a legal detriment. This was pointed out some time ago by Professor WILLISTON:[31] "Unless a promise imposes an obligation no promise whatever can be considered a detriment. It is therefore assuming the point in issue to say a promise is a detriment because it is binding."

Professor LANGDELL grappled with WILLISTON'S argument as to

[27] Langdell, Summary, § 82.
[28] Ashley on Contracts, 124.
[29] Vogel v. Pekoc, 157 Ill. 339; Velie, etc. Co. v. Kopmeier, etc. Co., 194 Fed. 324.
[30] Wald's Pollock on Contracts, 3rd ed. 203, n. 15.
[31] 8 Harv. L. Rev. 27, 35.

reasoning in a circle, but I do not find that he succeeds in meeting the point.[32] LANGDELL simply asserts it as a positive rule of law that if the promise can be binding, it is made so by the counter-promise, and it is for the objector to show why it is not. He does not himself show any reason why reciprocal promises logically are a detriment under his definition of consideration.

Professor ASHLEY states in his recent article,[33] "I must confess that the suggested difficulties have never impressed me. . . . . There seems to be no logical difficulty in saying that the law operates simultaneously on each and thereby transforms each action into a promise, each mutually dependent on the other. In all cases there must be some instant at which the law takes effect." Yes, but as Professor ASHLEY says, in the same paragraph, refuting his own contention, "the law refuses to annex the obligation of a contract to acts of the parties which lack this essential element" of consideration. The element of consideration must be found before the law can act on the promises. One promise cannot fertilize another with consideration until it is itself fertilized. To make them act simultaneously is simply to attempt, by a sort of parthenogenesis, to make each promise indirectly fertilize itself. Like the "loop the loop," you go around the circle so fast that you don't fall out or notice what has happened.

According to the premise assumed by Professor ASHLEY, Professor LANGDELL, and the other learned theorists, the law cannot operate on either promise to annex an obligation until the element of consideration is actually furnished, and yet by their theory the element of consideration is not furnished until the law has operated. Why should the law operate on both promises simultaneously any more than on either one alone until the consideration is furnished? The elements on which Professor ASHLEY insists are not yet present to set the law in motion, and still he would get around this by making the promises become binding all in a flash and generate their own consideration in the instant of becoming binding.

The whole trouble with the theory of consideration in bilateral contracts results from the major premise unnecessarily assumed by these learned theorists from a supposed analogy to unilateral contracts, that we must find in bilateral contracts a present detriment incurred on each side at the moment the contract is made.[34] But this premise is entirely false.

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[32] 14 Harv. L. Rev. 496, 502, 505; 2 Street's Foundations of Legal Liability, 108.

[33] 26 Harv. L. Rev. 433.

[34] Langdell, 14 Harv. L. Rev. 506; Ashley, 26 Harv. L. Rev. 429; compare 2 Street's Foundations of Legal Liability, 57, 119.

In bilateral contracts, we do not have to figure out a detriment already incurred or a benefit received at the time of making the contract. To insist on this is in effect to deny the possibility of "executory" consideration altogether. It is an artificial and medieval conception to think of each party's present grant of a right as forming the *quid pro quo* for the reciprocal grant of the other. In bilateral contracts the consideration is future. If there will be a real exchange or reciprocity of performance, the test of consideration is satisfied, when we say that mutual promises are consideration for each other we must be understood to speak elliptically, and by a figure of speech to use the word "promise" for "promised performance."

Professor ASHLEY finds himself unable to conceive how the contract can arise until the consideration is actually furnished. To him this means a contract without any consideration.[35] He does not seem to perceive that the rule of consideration is a mere test of the nature of the agreement, and the element of consideration may exist from the start in the nature of the agreement as a bargain before the exchange is actually carried out. He somewhat misinterprets the views of the present writer by confusing the test of consideration with that which is tested. The performance is not "the consideration" although we may often speak for convenience of the test of consideration as being the consideration. Performance on one side of a contract is intended to be in exchange for, or in consideration of, performance on the other; and the nature and relation of the performance called for are the test of the bargain.

If the parties to a bilateral contract contemplate that performance on one side is the exchange or price for the performance on the other, a nd if the discharge of one party's contractual duty by the other party's breach, actual or prospective, depends on the principle of failure of consideration, it would seem that the exchange of performances is the real bargain, and not the exchange of promises. To put the subject of consideration on this reasonable footing, therefore, goes far to clear up the doctrine of implied conditions in bilateral contracts as being based on failure of consideration.[36]

Professor WILLISTON approaches very closely to this view of the nature of consideration in bilateral contracts, "seeking the detriment necessary to support a counter-promise in the thing promised and not in the promise itself."[37] As he points out, however the

[35] 26 Harv. L. Rev. passim.
[36] See Wald' Pollock on Contracts, 323, n. 8; — Harv. L. Rev. 398.
[37] 8 Harv. L. Rev. 35, 36.

judges may define consideration, it is the sufficiency of the thing *to be done* which they consider,—the performance, not the fact that there is or is not an obligation to perform. Dean ASHLEY, too, would determine whether a promise is an obligation by the nature of the contemplated performance.[38] The conception of consideration herein advocated is largely drawn from Professor WILLISTON, under whom the writer first studied the law of contracts. At the same time Professor WILLISTON does not entirely discard the ancient formula that promise is consideration for promise, although this is the conclusion to which his reasoning would seem to lead. If a promise is consideration only when that which is promised would be so regarded, does this not prove that it is not the promise which is the consideration? And although Professor WILLISTON escapes from the absurdity of rating a promise higher than performance, does he entirely escape from the old question-begging fallacy which he himself exposed, when he speaks of the reciprocal promises covered by his test as furnishing the element of consideration for each other?[39]

It remains to say a word as to the secondary aspect of the consideration test, as applied to the sufficiency of completing or promising to complete a contract as consideration for a promise of additional compensation by the other party or by a third party. There is an exchange in fact here, there is a bargain; and the question turns on the second branch of the consideration formula, whether what is offered in exchange is a "legal detriment" having any possibility of value in the eye of the law, sufficient to be the foundation of a bargain. Looking at the question broadly, the real issue in such cases would seem to be not the theoretical or metaphysical possibility of finding a microscopic "legal detriment" in some imaginary rescission or in a waiver of a supposed right to break the contract and pay damages,[40] but whether good faith and business policy permit a contractor to exact additional compensation for completion under the circumstances.

In some cases of untoward difficulties supervening, either unknown or unforseen when the contract was made, (which, if our law were more liberal and just, would excuse performance), the contractor may be equitably or morally justified in a demand

[38] 26 Harv. L. Rev. 433, n. 11; Ashley on Contracts, 92, 93.

[39] Williston, Sales, 958; see also Wald's Pollock on Contracts (3rd ed.) 201, n. 14; 203, n. 15; 323, n. 8; Ames, 13 Harv. L. Rev. 31.

[40] Compare Shriner v. Craft (Ala.) 28 L. R. A. (N. S.) 450, with Evans v. Ore. & Wash. Rd. Co. (Wash.) 28 L. R. A. (N. S.) 455.

for more pay for the additional burden not contemplated by the parties, and a contract to that effect should be enforced.[41]

On the other hand the court should refuse its aid to a contractor who takes unjustifiable advantage of the necessities of the other party to coerce a promise to pay increased compensation, where there is no honest or equitable reason for abandoning performance of the contract.[42] Such an abstention from breach of contract is no more a sufficient basis for an honest claim than abstention from a crime, tort or breach of official duty. This distinction, suggested by the Minnesota case, convinces the sense of justice of many courts in the face of technical difficulties.[43]

Although one is already under contract with another to do a certain thing, if this contract was made in contemplation of the contracting party getting further compensation from others, it would not be a violation of his duty to earn more pay by making contracts with third parties for the same performance.[44] So if a contract with a third party for the same performance were made in ignorance of the prior contract and is not extorted by a threat of breach of contract, and the consideration is doing the thing rather than a promise to refrain from violating one's obligation, it would seem to serve no purpose of justice or utility to strike down such a contract for the reason that it does not satisfy the technical test of legal detriment.

The conflict of authority on this secondary aspect of consideration shows that "legal detriment," as a universal rule of thumb which may be applied blindly and mechanically to test the sufficiency or value of consideration, has broken down; and we are driven back to the test of public policy, which was suggested by Dean AMES,[45] to exclude contracts founded on wrong or bad faith practiced by one contracting party on the other. When the law of consideration is broadened so as to recognize not only bargain, but also all other just grounds for the enforcement of a promise, and gives up the foolish attempt to measure the sufficiency of what is promised in exchange by a mechanical formula, then there will be no occasion for its abolition by the courts or by the legislature.

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[41] King v. Duluth, etc. Ry. Co., 61 Minn. 482; Linz v. Schuck, 106 Md. 230, 11 L. R. A. (N. S.) 789, note.

[42] Alaska Packers' Association v. Domenico, 117 Fed. 99.

[43] See Note 11, L. R. A. (N. S.) 789.

[44] See Beale, 17 Harv. L. Rev. 71.

[45] 12 Harv. L. Rev. 529, n.; 13 Harv. L. Rev. 36, 42.